



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 19, 1998

Ms. Marie E. Galindo
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702

OR98-2451

Dear Ms. Galindo:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118709.

The City of Midland (the "city") received several requests from one requestor for information concerning the city's Board of Electrical Examiners (the "board") meetings and an application filed for a reciprocal license. In response to the request, you submit to this office for review the information which you assert is responsive. You seek to withhold from public disclosure, the requested information pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Before we consider the application of section 552.103 to the submitted records, we note that for compelling reasons of public policy, some information cannot be withheld from disclosure regardless of its relationship to litigation. Open Records Decision No. 551 (1990). The "litigation exception" cannot be applied to except from disclosure the official records of the public proceedings of a governmental body.¹ Open Records Decision No. 221 (1979); *see generally* Open Records Decision No. 412 (1984) (generally information which has already been disclosed to public, either in public board meetings or in some other manner, may not be withheld under attorney-client privilege). Thus, you must release the minutes from the Board meetings should they exist.

Next, we will consider whether section 552.103 excepts the remaining information from disclosure. To show that section 552.103(a) is applicable, the city must demonstrate

¹Information that a statute other than chapter 552 expressly makes public is not subject to the exceptions to required public disclosure. Open Records Decision No. 623 at 3 (1994). The minutes, tape recordings, and agenda of an open meeting are public records. Gov't Code §§ 551.022 (minutes and tape recordings), .041 (notice), .043 (time and accessibility of notice), .045 (emergency addition to agenda).

that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that the requestor "has been in direct communication with the United States Department of Justice" regarding the Americans with Disabilities Act. We have reviewed your brief and submissions; however, there is no evidence that any party has taken concrete steps toward litigation. Given the information provided, the prospect of litigation at this point is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 at 5 (1989) (governmental body must show that litigation involving a specific matter is realistically contemplated). Therefore, at this time, the city may not withhold the submitted documents pursuant to section 552.103(a).

We next consider your arguments under section 552.101 of the Government Code, which excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

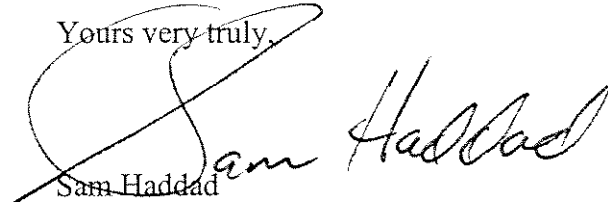
You seek to withhold the submitted license application and the highlighted information disclosed in the minutes of the board meetings. As for the highlighted information, you contend that the examination scores may be intimate and embarrassing to some examinees. Concerning the license application, you assert that the applicant has a right of privacy in the information and there is no legitimate interest in the requested application. We disagree. While we understand your concerns, we do not believe the test scores and license application are "highly intimate and embarrassing" information about the applicant that implicates their privacy. *See* Open Records Decision No. 600 (1992).² Furthermore, we

²Prior decisions of this office and a judicial decision have determined that various records of a licensee's or public employee's academic performance are not excepted from public disclosure by a right of privacy. *See Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); Open Records Decision Nos. 467 (1987) (college transcripts of public school teachers), 441 (1986) (teacher's performance on Texas Examination of Current Administrators and Teachers (TECAT)); *see also* Open Records Decision Nos. 157 (licensed engineer's college transcript and scores on state licensing exam), 154 (1977) (scores on civil service examination).

conclude that there is a legitimate public interest in the test scores and applicants for board licensing. Therefore, you may not withhold any of the submitted information under section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,


Sam Haddad
Assistant Attorney General
Open Records Division

SH/ch

Ref.: ID# 118709

Enclosures: Submitted documents

cc: Mr. Bob Russell
6212 West Papaw Street
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(w/o enclosures)